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Coming in January 2003: *Pacific Rim Law & Policy Journal*
Special Symposium Edition

**“Australia’s *Tampa* Incident: The Convergence of
International and Domestic Refugee and Maritime Law in the
Pacific Rim”**

The “*Tampa* Incident” refers to the events surrounding Australia’s refusal to accept more than four hundred Afghan and Iraqi asylum seekers who were rescued from a sinking Indonesian ferry by a Norwegian freighter (the M/V *Tampa*) on August 26, 2001. Ultimately, after an eight-day standoff in which multiple states, the United Nations, and international organizations weighed in, the asylum seekers were transferred to the island nation of Nauru for refugee claim processing.

Following the *Tampa* Incident, Australia instituted retroactive legislation to establish mandatory sentencing for people smugglers, restrictions on the legal rights of refugees, a new temporary visa system for “illegal” migrants who arrive without legal visas, and the excision of external territories from Australia’s migration zones.

Australia’s response to the *Tampa* Incident may contravene the obligations, as well as the spirit, of the international treaties established for refugee protection. Australia’s strong reluctance to allow vessels bearing illegal migrants to enter its territorial waters may also violate international maritime treaties. Thus, the *Tampa* incident is a catalyst for formulating and evaluating comprehensive plans in accordance with international law and customary norms to prevent protracted *ad hoc* decisions and alleviate the burdens placed on the Good Samaritan shipmaster.

In April 2002, the Pacific Rim Law & Policy Journal will host an international symposium, “Australia’s *Tampa* Incident: The Convergence of International and Domestic Refugee and Maritime Law in the Pacific Rim.” Following the symposium, the Journal will publish a Special Edition, which will feature articles by scholars and practitioners participating in the symposium.

In anticipation of the symposium, we are pleased to publish two student comments addressing the *Tampa* Incident: Emily C. Peyser, “*Pacific Solution*”? *The Sinking Right to Seek Asylum in Australia*; and Jessica E. Tauman, *Rescued at Sea, But Nowhere to Go: The Cloudy Legal Waters of the Tampa Crisis*.

“PACIFIC SOLUTION”? THE SINKING RIGHT TO SEEK ASYLUM IN AUSTRALIA

Emily C. Peyser[†]

Abstract: On August 26, 2001, Australia attracted worldwide media attention by refusing entry to over 430 Afghan and Iraqi asylum seekers who were rescued at sea by a Norwegian freighter. Australia's Parliament subsequently passed legislation to heighten already strict migration laws pertaining to boat migrants. Even though Australia is party to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, recent developments in national asylum policies retreat from the legal obligations, as well as the spirit, of these international treaties. Australia, however, is not the only country acting to deter boat migrants; the United States, for example, has also employed a high seas interdiction program to repel unwanted boat migrants since the 1980s.

To understand why Australia has made substantial changes to its migration laws, this Comment explores the shift in migration patterns in recent years that have induced States Parties to the Refugee Convention to tighten refugee provisions. This Comment further proposes that Australia's response—which includes disproportionate penalties for those who arrive by boat, and coercion of developing countries, such as Nauru and Papua New Guinea, to act as asylum processing sites—is not a sustainable or economically feasible legal policy. Australia's response serves as a catalyst for evaluating the challenges contemporary policy-makers face in reconciling the ideals of the 1951 Refugee Convention and its 1967 Protocol with current migration issues.

I. AUSTRALIA'S TAMPA ASYLUM SEEKER CRISIS

On August 26, 2001, when a crippled Indonesian ferry was sighted foundering in the Indian Ocean, Australian immigration officials announced that the biggest boatload of asylum seekers¹ ever to attempt to reach Australian shores was on its way.² Fortunately, over 430 Afghan and Iraqi

[†] The author wishes to thank Professor Joan Fitzpatrick, Professor Veronica Taylor, Carmel Morgan, and Denise Lietz, who offered invaluable advice and encouragement.

¹ This Comment generally uses the term “asylum seekers” for persons who are outside their country of origin and are seeking access to asylum processing at or within the borders of an asylum state, and the term “refugees” for persons who have been processed, whether in-country or overseas, and have been granted protection by the asylum state. Different legal terms, however, may be used to describe the same status in different countries. Under U.S. law, for example, refugee status is only available to persons applying from outside U.S. borders. Asylum status, in contrast, is available to persons seeking protection within U.S. borders. DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES 4 (3d ed. 1999). Under Australian law, “protection visas” are granted to those to whom Australia has protection obligations. Hossein Esmacili & Belinda Wells, *The ‘Temporary’ Refugees: Australia's Legal Response to the Arrival of Iraqi and Afghan Boat-People*, 23(3) U. NEW S. WALES L.J. 224, 228 (2000) (quoting Migration Act, 1958 (Austl.) [hereinafter Migration Act] § 36(2)).

² Nick Taylor, *Island Braces for Biggest Refugee Wave*, SUNDAY TELEGRAPH, Aug. 26, 2001, LEXIS, News Library, Australia Publications.

migrants were rescued by the M/V *Tampa*, a Norwegian freighter, and taken to waters off Christmas Island.³ When the *Tampa* entered Australian waters seeking assistance, Prime Minister John Howard ordered the Australian Defense Force to seize control of the Norwegian vessel and hold the migrants on board⁴ in order to keep them from setting foot on Australian soil and trying to claim asylum. Five days later, Howard ordered the migrants transferred onto the HMAS *Manoora*, bound for the island-state of Nauru, for distant asylum processing.⁵ This was the beginning of what Australia calls its "Pacific Solution."⁶

On September 8, the Australian navy intercepted and boarded a second Indonesian boat with 237 migrants, again Afghans and Iraqis, en route to Australia's Ashmore Reef.⁷ This second group of asylum seekers was disembarked from the Indonesian boat onto the *Manoora*, joining the first group.⁸ Although the United Nations High Commissioner for Refugees ("UNHCR") implored the Australia Government to grant the *Tampa* asylum seekers access to its national asylum determination procedure, it refused, and

³ *Vardarlis v. Ruddock*, 64 A.L.D. 67 (Sept. 11, 2001), *overruled by* *Ruddock v. Vardarlis*, 183 A.L.R. 1 (Sept. 18, 2001); *434 Boat People Rescued From Crippled Indonesian Ferry*, AAP NEWSFEED, Aug. 27, 2001, LEXIS, News Library, Australia Publications. Australia's Christmas Island is more than 900 miles from the mainland of Australia, but only 210 miles south of Indonesia's Java. Jana Mason, *Paying the Price: Australia, Indonesia Join Forces to Stop "Irregular Migration" of Asylum Seekers*, 22(8) REFUGEE REPORTS 1, 2 (Aug.-Sept. 2001). For an in-depth discussion of the international maritime law implications of this incident, see Jessica Tauman, Comment, *Rescued at Sea, But Nowhere to Go: The Cloudy Legal Waters of the Tampa Crisis*, 11 PAC. RIM L. & POL'Y J. 461 (2002).

⁴ *Vardarlis v. Ruddock*, 64 A.L.D. 67 (Sept. 11, 2001), *overruled by* *Ruddock v. Vardarlis*, 183 A.L.R. 1 (Sept. 18, 2001).

⁵ See Mason, *supra* note 3, at 9-10. Although the HMAS *Manoora* was originally bound for Papua New Guinea, where the asylum seekers would be transferred to Nauru and New Zealand, the *Manoora* was later ordered to bypass Papua New Guinea and proceed directly to Nauru. *Id.* The tiny South Pacific island of Nauru, twenty-one square kilometers with a population of 12,000, became an independent republic in 1968. Central Intelligence Agency, *The World Factbook: Nauru*, at <http://www.cia.gov/cia/publications/factbook/geos/nr.html> (last visited Mar. 5, 2002). The island was depleted of its phosphate-rich soil by a German-British mining consortium in the early 20th century and occupied by Australian forces during World War I. *Id.*

⁶ This new distant asylum processing system is what Australia calls its "Pacific Solution"; it entails intercepting boats bound for Australia and transporting boat people to various Pacific Islands. *No Shame in Putting National Interest First*, AUSTRALIAN, Jan. 28, 2002, LEXIS, News Library. Nauru agreed to house 1200 asylum seekers for application processing in return for education, health, and infrastructure aid as well as other incentives from Australia worth AUD 30 million total. Robert Garran & Megan Saunders, *Nauru Rescues PM Again*, AUSTRALIAN, Dec. 12, 2001, LEXIS, News Library. Papua New Guinea accepted 216 Pacific Solution asylum seekers in return for AUD 20 million from the Australian Government. *Id.* In addition, New Zealand accepted 131 asylum seekers. Natalie O'Brien et al., *Ring of Misery Around Region*, AUSTRALIAN, Oct. 25, 2001, LEXIS, News Library.

⁷ *Refugees Showdown*, SUNDAY AGE, Sept. 9, 2001, LEXIS, News Library, Major World Newspapers. Australia's Ashmore Reef is 192 miles from the mainland, but only 90 miles south of the Indonesian island of Roti, near West Timor. Mason, *supra* note 3, at 2.

⁸ *Refugees Showdown*, *supra* note 7.

the last of the asylum seekers to board the *Manoora* was offloaded at the island of Nauru on October 4.⁹

Immediately following the *Tampa* incident, and in a further attempt to deter the great influx of boat people, the Australian Parliament passed retroactive border control legislation to institute mandatory sentencing for people smugglers, restrict the legal rights of refugees, establish a new temporary visa system for "illegal" migrants,¹⁰ and excise external territories—including Christmas Island and Ashmore Reef—from Australia's migration zones.¹¹ In effect, asylum seekers who land—or have landed—on Australia's territorial islands may be transported to distant processing sites, and asylum seekers who pass through another "safe country,"¹² where they could have stayed without fear of persecution, may only apply for temporary visas.¹³

After the inception of Australia's new deterrence scheme, worldwide media attention exposed the plight of desperate boat people from "hot-spot" countries Afghanistan and Iraq.¹⁴ A third group of 262 Afghan and Iraqi asylum seekers was taken from Ashmore Reef on October 1 to Nauru aboard

⁹ Sian Powell & Megan Saunders, *Iraqis Forced Off Manoora*, AUSTRALIAN, Oct. 2, 2001, LEXIS, News Library. After a two-week refusal to disembark at Nauru, the last six asylum seekers were escorted off the HMAS *Manoora* by Australian soldiers in full battle dress and taken ashore. *Id.*

¹⁰ Asylum seekers who arrive in Australia without applying for refugee status from outside or whilst in possession of valid travel documents are referred to as "illegal" migrants. See Esmacili & Wells, *supra* note 1, at 224-25.

¹¹ Border Protection (Validation and Enforcement Powers) Act, 2001 (Austl.); Migration Amendment (Excision from Migration Zone) Act, 2001 (Austl.); Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act, 2001 (Austl.); Migration Legislation Amendment Act, No. 1, 2001 (Austl.); Migration Legislation Amendment Act, No. 5, 2001 (Austl.); Migration Legislation Amendment Act, No. 6, 2001 (Austl.); and, Migration Legislation Amendment (Judicial Review) Act, 2001 (Austl.). Australian statutes are available at the Australian Attorney-General's Department legal information retrieval system, SCALEplus, <http://scaleplus.law.gov.au> (last visited Mar. 9, 2002). For a description of important provisions of these acts, see *infra* Part IV.C.

¹² A "safe country" is defined as "a country that has an asylum process that meets international standards and is not itself a source of asylum seekers." Julie Mertus, *The State and the Post-Cold War Refugee Regime: New Models, New Questions*, 20 MICH. J. INT'L L. 59, 78 (1998) (citing Charles B. Keeley & Sharon Stanton Russell, *Responses of Industrialized Countries to Asylum Seekers*, 47 J. INT'L AFF. 399, 405 (1994); Alberto Achermann & Mario Gattikere, *Safe Third Countries: European Developments*, 7 INT'L J. REFUGEE L. 19 (1995); Eva Kjaergaard, *The Concept of "Safe Third Country" in Contemporary European Refugee Law*, 6 INT'L J. REFUGEE L. 649, 650-51 (1994)). Movement from a country of first asylum is sometimes described as "irregular" if no threat to the asylum seeker's physical safety or freedom existed in that first country. *Refugee Protection and Migration Control: Perspectives from UNHCR and IOM*, Global Consultations on Int'l Protection, 2d mtg., Doc. No. EC/GC/01/11, at 9 (May 31, 2001), at <http://www.unhcr.ch> [hereinafter *Refugee Protection*].

¹³ Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act, 2001 (Austl.); see *infra* Part IV.C.

¹⁴ For a discussion of country conditions in Afghanistan and Iraq, see *infra* Part IV.B.2.

the HMAS *Tobruk*, finally disembarking on October 15.¹⁵ When a fourth boatload of Iraqis was forcibly turned back toward Indonesia by the HMAS *Adelaide* on October 6, the asylum seekers jumped overboard, allegedly threw children overboard,¹⁶ and sabotaged the boat, forcing the navy frigate to rescue them and take them to Christmas Island.¹⁷ A fifth boat that departed from Indonesia on October 10 was allegedly hijacked by 170 Australia-bound asylum seekers and was found drifting in Indonesia's eastern archipelago a few weeks later.¹⁸ Then, tragically, on October 19, an overcrowded sixth boat carrying nearly 400 asylum seekers foundered in the rough seas of the Sunda Strait, between the Indonesian islands of Java and Sumatra.¹⁹ Only forty-five of its passengers were rescued, leaving over 350 drowned.²⁰ At least thirty of the people on board had been classified as genuine refugees by the UNHCR in Indonesia, but frustrated by resettlement delays, had left to try to claim asylum yet again in Australia.²¹ Thus, boat

¹⁵ Sian Powell, *Nauru Bauks at a Third Batch of Asylum Seekers*, AUSTRALIAN, Oct. 1, 2001, LEXIS, News Library; Robert Green, *Tobruk Delivers Its Human Cargo to Nauru*, AUSTRALIAN, Oct. 16, 2001, LEXIS, News Library.

¹⁶ *Boat People Sabotage Their Vessel*, AAP NEWSFEED, Oct. 8, 2001, LEXIS, News Library. Australian Defense Minister Peter Reith refused to publicly release a video that allegedly proved asylum seekers threw children overboard in an effort to put the Australian Government under duress. Robert Garran, *Reith Video Not Coming to a Screen Near You*, THE WEEKEND AUSTRALIAN, Oct. 27, 2001, LEXIS, News Library. However, other reports of October 10-11 did not depict children being thrown overboard. Steve Lewis et al., *Costello Forced to Find \$400M as Refugee Costs Spiral*, AUSTRALIAN FINANCIAL REV., Feb. 14, 2002, LEXIS, News Library. See also Vanda Carson & Natalie O'Brien, *Children Swam for Their Lives: Witness*, AUSTRALIAN, Nov. 9, 2001, LEXIS, News Library.

¹⁷ *Boat People Sabotage Their Vessel*, *supra* note 16. The 223 asylum seekers who were picked up by the HMAS *Adelaide* were housed on Christmas Island in a corrugated iron hall with no access to radio or television and no contact with island residents. Megan Saunders & Natalie O'Brien, *Deal with PNG to Take Boat People*, AUSTRALIAN, Oct. 12, 2001, LEXIS, News Library. Australia negotiated with Papua New Guinea to house these asylum seekers. *Id.*; Garran & Saunders, *supra* note 6.

¹⁸ Don Greenless, *'Hijacked' Refugees Found Off Indonesia*, AUSTRALIAN, Oct. 29, 2001, LEXIS, News Library. A crewman was found floating at sea after he had jumped overboard to escape. *Id.* This boat was later repaired in Indonesia and allegedly sighted continuing its journey to Australia. Don Greenless, *'Hijack' Boat Heading this Way Again*, AUSTRALIAN, Nov. 2, 2001, LEXIS, News Library [hereinafter *Boat Heading this Way*].

¹⁹ Megan Saunders, *Blame-and-Claim Game Trails a Human Tragedy*, WEEKEND AUSTRALIAN, Oct. 27, 2001, LEXIS, News Library.

²⁰ *Id.* Other boats journeying from Indonesia to Australia may also have gone down, including one with 247 people on board. See Don Greenless & Megan Saunders, *Forced on to Death Boat—Gun-Toting Security Officers Ordered Asylum Seekers to Sail*, AUSTRALIAN, Oct. 25, 2001, LEXIS, News Library.

²¹ The husband of one of the refugees lost in the tragic sinking on October 19 admitted that most of the people on the boat had been waiting for years to obtain a visa; they resorted to the people-smuggling network because they had no other hope from the Australian Government of reunion with their families in Australia. Penny Brown & Claire Harvey, *Muslims Say PM to Blame for Tragedy*, AUSTRALIAN, Oct. 26, 2001, LEXIS, News Library. Of the over 350 who drowned, 147 were children and 141 were women attempting passage to Australia to be reunited with family members who had only been granted temporary visas and, thus, could not bring their wives and children to join them for at least three years and perhaps never. Richard C. Paddock, *Bane of the Boat People*, L.A. TIMES, Jan. 5, 2002, at A1.

people continue to depart from Indonesia for Australia,²² in spite of the newly enacted deterrence strategy.

Australia is not the only country to apply a strict categorical response to unwanted boat people; the United States, for example, has also employed a controversial high seas interdiction program to repel unwanted boat migrants since the 1980s.²³ Thus, Australia's refusal to process the *Tampa* asylum seekers is merely an indication of the current deterrence trend in the domestic migration policies of industrialized nations, signaling a retreat from refugee protection as it exists within the language of the international treaties. Australia's deterrence scheme, which appears to be only marginally effective at dissuading desperate asylum seekers,²⁴ violates the international refugee protection obligations,²⁵ which include non-penalization for illegal entry into the state's territory, prohibition of expulsion, and non-return to the country of origin. Furthermore, Australia's scheme is unsustainable and economically infeasible legal policy.

Part II of this Comment examines Australia's history of strict immigration controls based on maintaining a distinct social and cultural identity. Part III explores the international legal obligations relating to refugee protection and presents the U.S. high seas interdiction program as an example of the retreat from these obligations at the national level. Part IV examines Australia's recent changes to its migration laws in light of shifting migration patterns, perceived abuses of asylum procedures, and loopholes in international law. Finally, Part V argues that Australia's response is not only illegal in view of its international obligations, but is also unsustainable and economically infeasible legal policy.

²² The Australian navy has escorted at least four boats back to Indonesia since the *Tampa* crisis. *Navy Turns Boat Back to Indonesia*, AGE, Dec. 22, 2001, LEXIS, News Library, Australia Publications.

²³ For a discussion of the U.S. interdiction policy, see *infra* Part III.B.2.

²⁴ Yet to be published figures show 1823 people headed to Australia in September and October of 2001—almost four times that of September and October of 2000 and more than double the two-month high of 657 in the spring of 1999. George Megalogenis, *Record Boat People Influx is Sinking PM's Policy*, AUSTRALIAN, Nov. 6, 2001, LEXIS, News Library. Although boat arrivals at Australian territorial islands have decreased since October, Prime Minister John Howard admitted that he could not say how much of the reduction in the numbers of boat people was due to his deterrence schemes and how much was due to the monsoon season. Mike Steketee, *No Excuse for All This Inhumanity*, AUSTRALIAN, Jan. 30, 2002, LEXIS, News Library; see also Belinda Hickman, *No Boats on Horizon as Cyclone Arrives*, AUSTRALIAN, Feb. 6, 2002, LEXIS, News Library.

²⁵ See *infra* Part III.A.

II. HISTORICAL BACKDROP: TRANSITION FROM THE "WHITE AUSTRALIA" POLICY

Historically, Australia maintained strict immigration controls based on racial and ethnic discrimination, commonly called the "White Australia" policy.²⁶ The Immigration Restriction Act of 1901²⁷ used a dictation test to favor Europeans and discreetly disqualify non-Europeans from admission.²⁸ Post-World War II legislation was directed toward the removal of Asian and other non-white migrants who had fled to Australia during the war.²⁹ Moreover, those immigrants who were permitted to enter were required to sign two-year employment contracts with the Australian Government, such that they could not compete with citizens for union jobs.³⁰ The shift away from overtly racist and discriminatory migration policies began with the abolishment of the controversial dictation test in 1958³¹ and the formal dismantling of the "White Australia" policy by the Whitlam Labor Government in 1973.³²

In a bipartisan effort, successive governments tried to further improve non-discriminatory migration policies.³³ In 1973, the short-lived Whitlam Government took bold steps to remove race as a factor in Australia's immigration policies.³⁴ The Fraser Coalition Government, which came into office in 1975, and the succeeding Hawke Labor Government in 1983, continued to stress multiculturalism³⁵ such that Asia became a main source of immigrants in the 1980s and 1990s.³⁶

Despite the gradual development of this non-racial immigration policy, Australia made major shifts away from accepting and

²⁶ Robert Birrell, *Immigration Control in Australia*, 534 ANNALS AM. ACAD. POL. & SOC. SCI. 106, 108 (1994). Birrell argues that Australia's current immigration policy is stricter than North American policies and "can be traced to [Australia's] heritage of control." *Id.* at 106.

²⁷ The Immigration Restriction Act 1901 was renamed the Immigration Act 1901 in 1912, and repealed by the Migration Act 1958.

²⁸ MARY CROCK, IMMIGRATION AND REFUGEE LAW IN AUSTRALIA 13 (1998). The desire for uniformity in immigration laws was one of the more pressing reasons favoring the federation of the colonies and the establishment of the Australian Commonwealth in 1901. *Id.* The Immigration Restriction Act 1901 used a difficult language test to exclude uneducated, non-white applicants by requiring them to "write out at dictation and sign in the presence of an officer, a passage of fifty words in length in an European language directed by the officer." *Id.* (quoting Immigration Restriction Act 1901 § 3(a)).

²⁹ *Id.* at 19.

³⁰ Birrell, *supra* note 26, at 108.

³¹ CROCK, *supra* note 28, at 19.

³² *Id.* at 7.

³³ *Id.*

³⁴ *Id.* at 33-34.

³⁵ Gianni Zappala & Stephen Castles, *Citizenship and Immigration in Australia*, 13 GEO. IMMIGR. L.J. 273, 291-92 (1999).

³⁶ *See id.* at 275.

accommodating onshore asylum seekers beginning in the 1990s.³⁷ Changes to migration policy were sparked by a sudden rise in asylum seekers from the People's Republic of China and Cambodia from 1989 to 1992³⁸ and with the election of the Liberal-National Party Coalition by a large majority in 1996.³⁹ In recent years, Australia has introduced a variety of deterrence measures in an attempt to manage or stop the arrival of asylum seekers on its territory.⁴⁰ These measures include legislative provisions directed toward dissuading potential migrants by restricting judicial review;⁴¹ by creating "mandatory detention" for those who arrive without a visa;⁴² and by employing a two-tiered visa protection program, which grants permanent protection visas to those who apply from overseas and temporary protection visas to those who arrive without a visa.⁴³ These provisions enacted in the 1990s acknowledge a retreat to a posture of self-determination, in which Australia chooses its refugees for resettlement from overseas, rather than accommodating people who show up on shore.

While early immigration policies were overtly fixed on maintaining the "White Australia" social and cultural identity by making race and ethnicity the principal qualifying factors for immigrants,⁴⁴ the recent focus of migration law has been fixed on border control and on measures that maximize the economic worth of the migration program⁴⁵ (albeit indirectly

³⁷ Andreas Schloenhardt, *Australia and the Boat-People: 25 Years of Unauthorised Arrivals*, 23(3) U. NEW S. WALES L.J. 33, 43 (2000).

³⁸ CROCK, *supra* note 28, at 128. Contributing factors were the violent repression of pro-democracy demonstrators at Tiananmen Square and civil war in Cambodia. *Id.* at 128.

³⁹ Zappala & Castles, *supra* note 35, at 294. "For the first time in over a decade, migration policy ceased to be a bi-partisan affair." CROCK, *supra* note 27, at 50.

⁴⁰ GUY S. GOODWIN-GILL, ARTICLE 31 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES: NON-PENALIZATION, DETENTION AND PROTECTION 23 (UNHCR Global Consultations 2001), <http://www.unhcr.ch>. For a detailed discussion of Australian legislative measures taken to deter immigration from 1989 to 1999, see Schloenhardt, *supra* note 37, at 43-54.

⁴¹ Hon. Phillip Ruddock, *Refugee Claims and Australian Migration Law: A Ministerial Perspective*, 23(3) U. NEW S. WALES L.J. 1, 8 (2000) [hereinafter *Refugee Claims*]. The Migration Legislation Amendment Act 1989 first limited judicial review by introducing a statutory merits review system. *Id.* The Migration Reform Act 1992 further limited judicial review by introducing Part 8 of the Migration Act, restricting federal court jurisdiction in migration decisions. *Id.*; CROCK, *supra* note 28, at 271.

⁴² CROCK, *supra* note 28, at 271. Without a visa, non-citizens in Australia are subject to mandatory detention and removal from the country per sections 189 and 198 of the Migration Act. *Id.*

⁴³ In 1999, the Australian Government amended the Migration Regulations 1994 such that asylum seekers who had established refugee status, but had entered Australia without legal documentation, categorically obtain three-year Temporary Protection Visas ("TPV"), "subclass 785 visa." Esmaceli & Wells, *supra* note 1, at 234. For further discussion on Australia's TPV, see *infra* note 106 and accompanying text.

⁴⁴ CROCK, *supra* note 28, at 11.

⁴⁵ *Id.*

reflecting social and cultural issues).⁴⁶ After the 2001 Border Protection Act, Migration Amendment Acts, and Migration Legislation Amendment Acts,⁴⁷ Australia's domestic legislation not only continues to contravene the Government's obligations under international treaties, but also is an unsustainable and economically infeasible legal policy given the issues that have emerged from changing migration patterns, such as mass influxes of asylum seekers from new source countries; the difficulty in distinguishing between economic migrants and refugees; the increasing visibility of people smuggling networks; and the proximity of asylum states to developing countries, like Indonesia, with little or no capacity to process refugees.

III. INTERNATIONAL LEGAL OBLIGATIONS AND NATIONAL IMPLEMENTATION

Australia is party to international treaties governing refugee protection. Australia, however, is not alone in its failure to fully consider the obligations and ideals of the international treaties in the context of boat people. In the United States, for example, the Coast Guard has intercepted unwanted boat migrants since the 1980s.⁴⁸ Based on the U.S. reaction to mass migrations of boat people from Haiti, it is likely that the United States would also respond to a *Tampa*-like crisis as Australia has responded.⁴⁹

⁴⁶ In fiscal year 2000-01, the 43% and 39%, respectively, of Offshore resettlement grants in the refugee category and special humanitarian category were issued to Europeans. DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS, POPULATION FLOWS: IMMIGRATION ASPECTS 27 (Feb. 2002 ed.), <http://www.immi.gov.au/statistics/index.htm> [hereinafter POPULATION FLOWS 2002]. For a discussion of Australia's Offshore Resettlement Program, see *infra* note 102 and accompanying text. The Australian Government's fiscal year ends June 30. Mason, *supra* note 3, at 8.

⁴⁷ Border Protection (Validation and Enforcement Powers) Act, 2001 (Austl.); Migration Amendment (Excision from Migration Zone) Act, 2001 (Austl.); Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act, 2001 (Austl.); Migration Legislation Amendment Act, No. 1, 2001 (Austl.); Migration Legislation Amendment Act, No. 5, 2001 (Austl.); Migration Legislation Amendment Act, No. 6, 2001 (Austl.); and Migration Legislation Amendment (Judicial Review) Act, 2001 (Austl.), available at <http://scaleplus.law.gov.au> (last visited Mar. 9, 2002).

⁴⁸ It is interesting to compare Australia and the United States in the immigration context because both are large, industrialized nations with scarcely populated rural areas, ethnically diverse cities, and expansive perimeter coastlines that are difficult to patrol. Furthermore, both countries are closely situated to other developing nations, neither country is war-torn, and both countries are primarily comprised of descendants of immigrants. A significant difference is that Australia, unlike the United States, has no Coast Guard.

⁴⁹ Research conducted by U.S. pollster Wirthlin Worldwide group between January 18 and 21, 2002 on U.S. public opinion showed that 71% of Americans in the poll supported Australia's right to turn back boats containing illegal migrants. Glen Milne, *Critics on Wrong End of Poll*, AUSTRALIAN, Feb. 4, 2002, LEXIS, News Library.

A. *Refugee Protection in International Law*

1. *Refugee Convention and Protocol*

Largely prompted by the tragedy of European Jews and the plight of other millions of war-displaced European people, the 1951 Convention relating to the Status of Refugees ("Refugee Convention") and the 1967 Protocol ("Protocol")⁵⁰ are the principal international instruments established for refugee protection.⁵¹ States Parties to the Refugee Convention and Protocol undertake to accord certain standards of treatment to refugees and to guarantee them certain rights,⁵² including non-penalization for illegal entry into a state's territory, prohibition of expulsion, and *nonrefoulement*.⁵³ Today, 141 States Parties have agreed to compromise state sovereignty in the interest of protecting the world's fourteen million refugees.⁵⁴

At the heart of the Refugee Convention and Protocol is the definition of a "refugee" as any person who

⁵⁰ Convention relating to the Status of Refugees *opened for signature* July 28, 1951 (19 U.S.T. 6259; 189 U.N.T.S. 150; A.T.S. 1954/5), available at <http://untreaty.un.org> [hereinafter *Refugee Convention*]; United Nations Protocol to the Convention relating to the Status of Refugees *opened for signature* Jan. 31, 1967 (A.T.S. 1973/37; 19 U.S.T. 6223, 6224(E), 6230(F); 606 U.N.T.S. 267) [hereinafter *Protocol*], available at <http://untreaty.un.org>. The 1967 Protocol incorporated the "well-founded fear" definition of the 1951 Refugee Convention's Article 1 but eliminated the "time and place" limitations. KAREN MUSALO ET AL., *REFUGEE LAW AND POLICY* 57 (2002). States Parties to the 1967 Protocol also agreed to be bound by Articles 2-34 of the 1951 Convention. *Id.* As of January 1, 2002, there were 141 States Parties to either the Refugee Convention or Protocol or both. United Nations High Commissioner for Refugees, *States Parties to the 1951 Convention Relating to the Status of Refugees* (Jan. 1, 2002), <http://www.unhcr.ch> [hereinafter *States Parties*]. Australia is party to both the Refugee Convention and Protocol; the United States is party only to the Protocol. *Id.* Asia is the region where the least states have ratified the Refugee Convention and Protocol. *Id.*; see also Joan Fitzpatrick, *Taking Stock: The Refugee Convention at 50*, in U.S. COMMITTEE FOR REFUGEES, *WORLD REFUGEE SURVEY* 22 (2001) [hereinafter *Taking Stock*] (stating that "[w]hile states continue to ratify the Convention and its 1967 Protocol, serious gaps remain, especially in Asia.").

⁵¹ United Nations High Commissioner for Refugees, *Introductory Note to the 1951 Convention relating to the Status of Refugees and 1967 Protocol Relating to the Status of Refugees*, <http://www.unhcr.ch> (Mar. 1996).

⁵² The implementation of the Refugee Convention is decentralized; states choose how to implement the provisions themselves, whether by "legislative incorporation, administrative regulation, informal and *ad hoc* procedures, or a combination thereof." GOODWIN-GILL, *supra* note 40, at 31.

⁵³ Refugee Convention, *supra* note 50, arts. 1, 31-33. *Nonrefoulement* is a technical term for protection, deriving from Article 33 of the Refugee Convention, and meaning an obligation of non-return of a refugee to a country where the refugee's life or freedom would be threatened on account of one of the five reasons listed in Article 1. David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1255-56 (1990).

⁵⁴ *States Parties*, *supra* note 50. At the end of 2000, 14.5 million refugees and asylum seekers were in need of protection. U.S. COMMITTEE FOR REFUGEES, *WORLD REFUGEE SURVEY* 4 (2001) [hereinafter *WORLD REFUGEE SURVEY* 2001]. Furthermore, internally displaced persons are estimated at more than 20 million. *Id.* at 6.

owing to well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁵⁵

Article 31 of the Refugee Convention prohibits “penalties” imposed on refugees,⁵⁶ such that States Parties

shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.⁵⁷

Article 31 can be interpreted as an obligation for States Parties to refrain from adopting practices that might deter certain refugees from seeking protection there or as a duty to treat all asylum seekers alike without discriminating between legal and illegal migrants.⁵⁸

Article 32 of the Refugee Convention prohibits contracting States Parties from “expel[ling] a refugee lawfully in their territory save on grounds of national security or public order” and only “in pursuance of a decision reached in accordance with due process of law.”⁵⁹ Finally, Article

⁵⁵ Refugee Convention, *supra* note 50, art. 1.

⁵⁶ “Although expressed in terms of the refugee, [the Refugee Convention] provision would be devoid of all effect unless it also extended, at least over a certain time, to asylum seekers . . . [who are] ‘presumptive refugees.’” GOODWIN-GILL, *supra* note 40, at 8 (quoting *R. v. Uxbridge Magistrates Court, ex parte Adimi*, Imm. A.R. 560 (U.K. 1999)).

⁵⁷ Refugee Convention, *supra* note 50, art. 31(1).

⁵⁸ Esmacili & Wells, *supra* note 1, at 229. The term “penalties” is not defined in Article 31 of the Refugee Convention, but the drafters appear to have considered measures such as prosecution, fine, and imprisonment. GOODWIN-GILL, *supra* note 40, at 9. Administrative detention, however, is allowed under Article 31(2) of the Refugee Convention when it is necessary to investigate the circumstances of entry or to obtain information about unknown persons. *Id.*

⁵⁹ Refugee Convention, *supra* note 50, art. 32. Australia might attempt to argue grounds of national security based on the terrorism attack on the United States on September 11, 2001 and the subsequent “War

33 of the Refugee Convention imposes a protection obligation of *nonrefoulement*, or non-return to a country in which the asylum seeker's life or freedom would be threatened, regardless of whether the asylum seeker has valid travel documents to justify his or her presence in the country.⁶⁰

2. United Nations High Commissioner for Refugees

The UNHCR was established in 1950, shortly before the drafting of the Refugee Convention, as the international supervisory agency for implementing refugee protection and promoting durable solutions to the problem of refuge.⁶¹ The functions of the UNHCR are far more complex today than they were in 1951, as the organization blends its state-supervisory and refugee-protection roles by attempting to enforce the protection provisions of the Refugee Convention, as well as contributing hands-on to refugee determination when states fail to process refugees.⁶² Moreover, the UNHCR is sustained by donations from the States Parties to the Refugee Convention and Protocol.⁶³ These complexities leave the UNHCR with little policing power when domestic systems diverge from international obligations.⁶⁴ As a result, refugee determination is made either at the domestic level by the administrative or judicial processes of individual

Against Terrorism." The *Tampa* incident, however, began two weeks before the September 11 attack occurred in the United States.

⁶⁰ Refugee Convention, *supra* note 50, art. 33. Under Article 33, the receiving nation technically remains free to send a refugee, who has been granted asylum by the receiving nation, on to another country rather than granting asylum on its soil. Martin, *supra* note 53, at 1255-56. Receiving nations, however, rarely find other countries to take refugees. See Megan Saunders, *New Zealand 'Next Smuggling Target,' AUSTRALIAN*, Jan. 17, 2002, LEXIS, News Library [hereinafter *Next Smuggling Target*].

⁶¹ The UNHCR was established on December 14, 1950 by the United Nations General Assembly. *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428(V), U.N. GAOR, 5th Sess., Supp. No. 20, at 46, U.N. Doc. A/1775 (1950), <http://www.unhcr.ch> [hereinafter *Statute of the UNHCR*].

⁶² *Taking Stock*, *supra* note 50, at 24. For example, the UNHCR implored Australia to process the *Tampa* asylum seekers in Australia, but when Australia refused the UNHCR proceeded to step in and process the boat migrants at Nauru. See *supra* note 9 and accompanying text; see also Megan Saunders, *Nauru Refugee Decisions Imminent*, *AUSTRALIAN*, Jan. 3, 2002, LEXIS, News Library (noting that once the UNHCR is finished processing "Pacific Solution" asylum seekers and successful claims have been determined, the individual cases will be submitted to traditional resettlement countries).

⁶³ *Taking Stock*, *supra* note 50, at 24 (noting the UNHCR's budget relies upon voluntary donations from the states whose compliance it monitors). Australia contributed USD 1.13 per capita in 2000, totaling USD 21.7 million; the United States contributed USD 1.40 per capita in 2000, totaling USD 387.1 million. WORLD REFUGEE SURVEY 2001, *supra* note 54, at 10.

⁶⁴ *Taking Stock*, *supra* note 50, at 24.

nation states or, when states fail to act, at the international level by the UNHCR itself.⁶⁵

At the international level, the UNHCR implements procedures to identify refugees when national authorities have no resources to process asylum seekers, such as Indonesia or Nauru, or merely refuse to participate in processing.⁶⁶ The UNHCR promotes three solutions to the problem of refuge for States Parties: voluntary repatriation of the refugee to her country of origin, local integration in the country of first asylum, and resettlement in a third country.⁶⁷ However, some States Parties, such as Australia and the United States, have established domestic strategies to address recent changes in migration patterns that diverge from these solutions and the ideals of the Refugee Convention.

B. Refugee Protections in the United States

The United States includes the important provisions of the Refugee Convention and Protocol in its statutory refugee law. In practice, however, the United States diverges from these obligations, with the interdiction program as an example.

1. Statutory Refugee Law in the United States

Refugee protection in the United States derives from the provisions of the Refugee Convention and Protocol, with the definition of a refugee at its core.⁶⁸ The United States provides three forms of relief for persons fleeing

⁶⁵ The Australian Minister of Immigration Affairs asserts that the function of the UNHCR in determining refugee status is part of its mandate. See *Refugee Claims*, *supra* note 41, at 1 (citing *Statute of the UNHCR*, *supra* note 61, chs. I & II).

⁶⁶ United Nations High Commissioner for Refugees, *Protecting Refugees—An Introduction*, at <http://www.unhcr.ch> (Dec. 1, 2000).

⁶⁷ *Id.*; MUSALO, MOORE & BOSWELL, *supra* note 50, at 43-45.

⁶⁸ ANKER, *supra* note 1, at 3. The United States defines a “refugee” as:

any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion

Immigration and Naturalization Act § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A) (West 2000 & Supp. 2001). In the United States, the basic source of refugee law is the Immigration and Nationality Act (“INA”), codified in Title 8 of the United States Code. See generally ANKER, *supra* note 1, at ch. 1.

persecution: refugee status, asylum, and withholding of deportation.⁶⁹ Refugee status (also known as the Overseas Refugee Program)⁷⁰ under U.S. law, like Australia's Offshore Protection Program,⁷¹ is available to persons applying from outside the United States who have been identified as persons of "special humanitarian concern."⁷² The number of refugee admissions, currently set at 50,000, is limited by region, with a system of priorities determined each year by statutory consultation between the Executive and Congress.⁷³

Asylum status, in contrast to refugee status, is available to persons seeking protection either from within the United States or at its borders,⁷⁴ and, unlike the refugee provision, requires no prior designation that the person is a refugee "of special humanitarian concern."⁷⁵ The main criteria for asylum are contained in the basic refugee definition: persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁷⁶ U.S. asylum law is formally discretionary⁷⁷ and, in contrast to Australia's system,⁷⁸ generally has no numerical or categorical limitations to grants of asylum.⁷⁹

Withholding of deportation—based on the Refugee Convention's Article 33 obligation of *nonrefoulement*—is usually a companion form of relief to asylum.⁸⁰ Whereas the asylum provision is discretionary,⁸¹ the U.S.

⁶⁹ ANKER, *supra* note 1, at 4-5; Immigration and Naturalization Act §§ 207, 208, 241(b)(3) (formerly § 243(h)), 8 U.S.C.A. §§ 1157, 1158(a)(1), 1231(b)(3) (West 2000 & Supp. 2001).

⁷⁰ MUSALO, MOORE & BOSWELL, *supra* note 50, at 67.

⁷¹ See *infra* note 102 and accompanying text.

⁷² § 207; ANKER, *supra* note 1, at 4.

⁷³ § 207.

⁷⁴ ANKER, *supra* note 1, at 4 (citing § 208(a)(1)).

⁷⁵ *Id.* at 5.

⁷⁶ *Id.* at 4-5.

⁷⁷ Immigration and Nationality Act § 208(b)(1), 8 U.S.C.A. § 1158(b)(1) (West 2000 & Supp. 2001) ("The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A), [definition of a refugee].").

⁷⁸ See *infra* note 104 and accompanying text.

⁷⁹ ANKER, *supra* note 1, at 5.

⁸⁰ Immigration and Nationality Act § 241(b)(3), 8 U.S.C.A. § 1231(b)(3) (West 2000 & Supp. 2001); ANKER, *supra* note 1, at 5. Section 243(h) is the predecessor to what the 1996 Act redesignated as § 241(b)(3). T.A. ALENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 1033 (4th ed. 1998).

⁸¹ Matter of Salim, 18 I. & N. Dec. 311, 315 (BIA 1982), quoted in ALENIKOFF, MARTIN & MOTOMURA, *supra* note 60, at 1033-34. In *Matter of Salim*, the Board explained the relationship between the asylum provision, § 208, and the withholding provision, then § 243(h) (redesignated as § 241(b)(3) in 1996):

Section 243(h) relief is "country specific" and accordingly, the applicant here would be presently protected from deportation to Afghanistan pursuant to § 243(h). But that section would not

1980 Refugee Act transformed the withholding provision into a mandatory provision.⁸² Although the core substantive grounds are the same for asylum, withholding protects a person from return to the country of persecution, but does not grant asylum status in the United States.⁸³

2. *The Era of Deterrence*

Despite seemingly genuine attempts to conform to the obligations of international law, the United States began to institute its deterrence scheme for boat people in the 1980s.⁸⁴ The boatlift in 1980 from the Cuban port of Mariel⁸⁵ brought over 125,000 Cuban asylum seekers to the United States within only a few short months.⁸⁶ As Cubans flooded into the United States, many people started thinking about how to avoid mass migration situations in the future.⁸⁷ In response, the Select Commission on Immigration and Refugee Policy made a series of recommendations for managing mass migration emergencies, such as adopting policies and procedures to effectively deter illegal migration of those who will not likely meet the criteria of asylum.⁸⁸ The U.S. interdiction program⁸⁹ is one such scheme

prevent his exclusion and deportation to Pakistan or any other hospitable country . . . if that country will accept him. In contrast, asylum is a greater form of relief. When granted asylum, the alien may be eligible to apply for adjustment of status to that of a lawful permanent resident pursuant to § 209 of the Act, after residing here one year, subject to numerical limitations and the applicable regulations. *Id.*

⁸² Pub. L. No. 96-212, 94 Stat. 102 (1980). Congress enacted the Refugee Act of 1980 in order to conform U.S. refugee law to the Protocol's directives. See ANKER, *supra* note 1, at 9 n.42 (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987)) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Protocol], to which the United States acceded in 1968."). Moreover, important textual changes were made to the withholding provision in 1980 to track more closely the international obligations assumed by the United States when it ratified the Protocol in 1968. Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERK. J. INT'L L. 1, 6 (1997).

⁸³ ANKER, *supra* note 1, at 6.

⁸⁴ ALEINIKOFF ET AL., *supra* note 80, at 1155.

⁸⁵ In 1980, Fidel Castro opened the Cuban port of Mariel. Matthew A. Pingeton, Comment, *United States Immigration Policy: Detaining Cuban Refugees Taken from the Sea*, 8 J. TRANSNAT'L L. & POL'Y 329, 330 (1999). In six months, over 125,000 Cubans emigrated from the port of Mariel to the United States. *Id.*

⁸⁶ ALEINIKOFF ET AL., *supra* note 80, at 1155.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1155-56.

⁸⁹ The interdiction program was commenced pursuant to the U.S.-Haiti Interdiction Agreement, under which the Haitian Government assured that repatriated Haitians would not be subject to punishment upon return to Haiti for their illegal departure. Agreement on Migrants—Interdiction, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559, 3560, T.I.A.S. No. 10241, *cited in* Sale v. Haitian Centers Council, 509 U.S. 155, 160 n.8 (1993). In the 1980s, the U.S. Coast Guard boarded any Haitian vessel that appeared to be carrying migrants and transferred the migrants to Coast Guard cutters. *Id.* at 161. The migrants were interviewed

designed to deter boat migrants: preliminary asylum screening is conducted on the high seas to exploit the water separation between other nations and U.S. soil.⁹⁰

The interdiction program came under great scrutiny after thousands of Haitian asylum seekers were returned to a land where they likely faced persecution without receiving any preliminary asylum screenings.⁹¹ In 1993, however, the United States Supreme Court held in *Sale v. Haitian Centers Council* that neither domestic law (the withholding provision⁹²) nor international law (*nonrefoulement*⁹³) limits the Executive's power to order the Coast Guard to repatriate illegal migrants intercepted on the high seas.⁹⁴

The M/V *Tampa* incident is notably different from the repatriation of Haitian asylum seekers. The Haitians were involuntarily returned to their country of origin. The *Tampa* migrants, on the other hand, were repelled from Australia, but they were not returned to their country of origin. Instead, they were processed for asylum by the UNHCR in surrounding "declared countries."⁹⁵ Although Article 33 *nonrefoulement* applied to the

by asylum officers, and any passenger who substantiated a "well-founded fear of persecution" was transported to the United States to apply for asylum. *Id.* at 161-62. The others were returned to Haiti. *Id.* From 1981 to 1991, 25,000 Haitian boat migrants were intercepted and only twenty-eight were transported to the United States for asylum processing. Christopher Mitchell, *U.S. Policy Toward Haitian Boat People*, 1972-93, 534 ANNALS AM. ACAD. POL. & SOC. SCI. 69, 73-74. The costs of the U.S. interdiction program were approximately USD 30 million per year during the 1980s. *Id.*

⁹⁰ Mitchell, *supra* note 89, at 71. The deterrent effect of interdiction was considerable; in 1980 alone 24,530 Haitian migrants were arrested in south Florida, while in the succeeding eight years a total of 21,906 were apprehended there. *Id.* at 74.

⁹¹ A military coup toppled the government of Jean Bertrand Aristide on September 30, 1981, resulting in serious human rights abuses, including extrajudicial killings by the security forces and partisan mobs, disappearances, torture and other mistreatment of prisoners, arbitrary arrests, and executive interference with the judicial process. See Department of State, 103d Cong., 1st Sess., Country Reports on Human Rights Practices for 1992, at 421; Department of State 102d Cong., 2d Sess., Country Reports on Human Rights Practices for 1991, at 633-34. Prior to the involuntary repatriation of Haitians, 32.6% of Haitians who were processed at Guantanamo Bay were permitted to apply for asylum. Mitchell, *supra* note 89, at 74. After Aristide's overthrow, U.S. interdiction costs were estimated at four times that of the 1980s. *Id.* at 75.

⁹² Immigration and Nationality Act § 241(b)(3) (formerly § 243(h)(1)), 8 U.S.C.A. § 1231(b)(3) (West 2000 & Supp. 2001).

⁹³ Refugee Convention, *supra* note 50, art. 33.

⁹⁴ 509 U.S. 155, 159 (1993). This conclusion directly contradicts the UNHCR's position that the Article 33 obligations of *nonrefoulement* apply "whenever a State acts," including in territorial and extraterritorial waters. Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents at 3, *McNary v. Haitian Centers Council*, 509 U.S. 155 (1993) (No. 92-344) [hereinafter UNHCR Brief].

⁹⁵ A "declared country" is specified in writing by the Minister of Immigration as a country that "(i) provides access for persons seeking asylum, to effective procedures for assessing their needs for protection; and (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and (iv) meets relevant human rights standards in providing that protection." Migration Amendment (Excision from Migration Zone) (Consequential

Haitian asylum seekers, while Article 31 non-penalization as well as Article 32 prohibition of expulsion applied to the *Tampa* asylum seekers, both incidents involved the repelling of asylum seekers from their destination asylum state merely because of their form of arrival—by boat.⁹⁶ Despite this difference, the U.S. and Australian responses are similar because both were quick political reactions to drastic changes in migration patterns. Driven by concerns over public reactions and perceptions, leaders in both countries attempted to stop boat migration by eliminating the asylum-grant magnet.

IV. AUSTRALIA'S NEW MIGRATION POLICY

Australia, as a party to the Refugee Convention and Protocol, has recently incorporated changes into its migration policy that retreat from the international principles of refugee protection established post-World War II. Thus, the applicability of international law in mass boat migration situations has become uncertain as States Parties, such as Australia and the United States, introduce divergent interpretations.⁹⁷ These policies of categorically repelling boat migrants are not only illegal at the international level, but they are unsustainable and economically infeasible at the domestic level.

A. *International Law Incorporated in Australian Migration Law*

Although Australia signed and ratified both the Refugee Convention and the Protocol, it does not fully incorporate the treaty provisions into its domestic laws.⁹⁸ Nevertheless, Australia does show an intention to conform to the international regime for refugee protection. For example, Australia indirectly incorporates the Refugee Convention Article 1 definition of a refugee in its domestic law, identifying to whom Australia has protection

Provisions) Act, 2001 (Austl.); see also Department of Immigration and Multicultural and Indigenous Affairs, *Australian Immigration Fact Sheet No. 75: Processing Unlawful Boat Arrivals*, at http://www.immi.gov.au/facts/75processing_1.htm (last modified Nov. 14, 2001).

⁹⁶ Interestingly, the Australian Full Court did not address the applicability of Article 31(1) in *Ruddock v. Vardaris*. 183 A.L.R. 1 (Sept. 18, 2001). GOODWIN-GILL, *supra* note 40, at 24 n.27.

⁹⁷ *Taking Stock*, *supra* note 50, at 22.

⁹⁸ CROCK, *supra* note 28, at 123, 126; Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969 (1155 U.N.T.S. 331, A.T.S. 1974/2). Notwithstanding that Australia is a party to the 1969 Vienna Convention of the Law of Treaties and agrees to comply with international obligations in good faith, international instruments have little effect without incorporation into its domestic legislation. See Mary Crock, *A Sanctuary Under Review: Where to From Here for Australia's Refugee and Humanitarian Program*, 23(3) U. NEW S. WALES L.J. 246, 256 (2000) [hereinafter *Sanctuary Under Review*]. Australia acceded to the Vienna Convention on June 13, 1974 and it came into force on January 27, 1980. *Id.* at 256 n.41

obligations.⁹⁹ Moreover, Australia partially implemented the Refugee Convention through the Migration Act of 1958 ("Migration Act") by establishing protection visas for non-citizens who qualify for refugee status.¹⁰⁰

The current Australian regime for refugee determination is two-tiered with an Offshore Resettlement Program and an Onshore Protection Program.¹⁰¹ The Offshore Resettlement Program accommodates overseas applicants: refugees and people of humanitarian concern.¹⁰² The Onshore Protection Program, on the other hand, allows asylum seekers who are already in Australia—whether they arrived on temporary visas or in an unauthorized manner—to apply for a protection visa in accordance with the *nonrefoulement* provision of the Refugee Convention.¹⁰³ Together, the Offshore and Onshore programs have allowed 12,000 admissions per year since 1999.¹⁰⁴

Unlike the system in the United States, Australia grants only temporary protection to a refugee who arrived without legal documentation, e.g., a visa. Applicants who engage refugee protection in Australia are granted one of two types of protection visas: a Permanent Protection Visa ("PPV") for refugees who entered Australia lawfully (e.g., on a tourist or student visa)¹⁰⁵ or a Temporary Protection Visa ("TPV") for refugees who entered Australia in an unauthorized manner (e.g., without a temporary

⁹⁹ CROCK, *supra* note 28, at 126. Reference is made to the Refugee Convention in Migration Act § 5(1) and in Migration Regulations 1994 Schedule 2, cl. 866. *Id.*

¹⁰⁰ Migration Act § 36 provides a protection visa to "a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol"

¹⁰¹ Department of Immigration and Multicultural and Indigenous Affairs, *Australian Immigration Fact Sheet 60: Australia's Refugee and Humanitarian Program*, at <http://www.immi.gov.au/facts/60refugee.htm> (last modified Nov. 8, 2001) [hereinafter *Fact Sheet 60*].

¹⁰² *Id.* While the Refugee Program is for people who are outside their home country but subject to persecution in their home country, the Special Humanitarian Program is for people who are also outside their home country but subject to substantial discrimination amounting to a gross violation of human rights in their home country. *Id.* An applicant for the Special Humanitarian Program must be sponsored or supported by people resident in or an organization based in Australia. *Id.*

¹⁰³ POPULATION FLOWS 2002, *supra* note 46, at 24.

¹⁰⁴ *Id.* at 25. As a result of the increase of unauthorized arrivals in 2001, the size of the Offshore program is still under consideration. *Id.* In 2000-01, 8000 visas were allocated to Offshore applicants (4000 visas for the Offshore Refugee Program; 4000 visas for the Offshore Special Humanitarian Program). DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS, POPULATION FLOWS: IMMIGRATION ASPECTS 24 (Dec. 2000), <http://www.immi.gov.au/statistics/index.htm>. The remainder of places were allocated to Onshore asylum seekers. *Id.* By policy decision, if the number of Onshore visas exceeds the number allocated, then the number of Offshore visas are reduced accordingly so that the number of refugees never exceeds 12,000. David Corlett, *Politics, Symbolism and the Asylum Seeker Issue*, 23(3) U. NEW S. WALES L.J. 13, 18 (2000).

¹⁰⁵ Migration Regulations of 1994, sched. 2, pt. 866, <http://scaleplus.law.gov.au>; POPULATION FLOWS 2002, *supra* note 46, at 28.

visa).¹⁰⁶ The three-year TPV was introduced in October 1999,¹⁰⁷ after the number of unauthorized boat people rose from 921 in fiscal year 1998-99 to 4175 in 1999-00,¹⁰⁸ as an attempt to counterbalance the great increase in the number of unauthorized boat arrivals.¹⁰⁹ Thus, "in order to discourage the perception of Australia as a soft target,"¹¹⁰ asylum seekers who arrive illegally, e.g., by boat and without a visa, and who are owed protection obligations by Australia, are only provided with a temporary residence solution.¹¹¹

B. *Recent Changes in Migration Patterns Affecting National Policies*

The *Tampa* asylum seekers provoked political action in Australia only because of the upsurge in undocumented arrivals in the previous week. Three boats carrying over 1000 asylum seekers had arrived on Australian territorial islands in the week immediately preceding the *Tampa* incident.¹¹² This drastic change in Australia's boat migration patterns—a great influx of migrants from new source countries facilitated by people smugglers who operate out of Indonesia—and the Refugee Convention's failure to address these issues has led Australia to develop a scheme to deter asylum seekers who arrive by boat.

1. *Influx of Boat Migrants from New Source Countries*

With changing international conditions, countries with established patterns of accepting asylum seekers are now under intense pressure to process increased numbers of applicants from new source countries. While Australia has traditionally received waves of immigrants from neighboring East Asian and Pacific states,¹¹³ recent statistics show that most asylum

¹⁰⁶ Migration Regulations 1994, sched. 2, pt. 785; POPULATION FLOWS 2002, *supra* note 46, at 28.

¹⁰⁷ Migration Amendment Regulations, No. 12, 1999, <http://scaleplus.law.gov.au>. Holders of TPVs are not entitled to the same benefits as holders of PPVs, such as access to social programs, the right to family reunification, or the automatic right of return should they need to travel abroad. GOODWIN-GILL, *supra* note 40, at 24; see also Esmacili & Wells, *supra* note 1, at 234-35.

¹⁰⁸ Philip Ruddock, *Background Paper on Unauthorized Arrivals Strategy*, at http://www.minister.immi.gov.au/media_releases/media01/r01131_tables.htm (last visited Mar. 5, 2002) [hereinafter *Background Paper*]; Mason, *supra* note 3, at 1.

¹⁰⁹ *Refugee Claims*, *supra* note 41, at 3-4.

¹¹⁰ *Id.* at 4.

¹¹¹ *Id.*

¹¹² The first group of 348 people landed on Christmas Island on August 16, a second boat with 230 people reached Ashmore Reef on August 20, and a third boat carrying 360 persons landed on Christmas Island on August 22. Mason, *supra* note 3, at 8.

¹¹³ See *supra* Part II.

seekers who arrive in Australia by boat and without valid travel documents are from new source countries, Afghanistan and Iraq.¹¹⁴ During 1999-2000, 4175 unauthorized migrants arrived on the nation's shores by boat, with eighty-five percent of the migrants from Afghanistan and Iraq.¹¹⁵ Arrivals continued to stream into Australia at this high level in 2000-2001, recorded at 4141,¹¹⁶ with seventy-eight percent from Afghanistan and Iraq.¹¹⁷

More significant, however, than the mere upsurge in migration is the lack of a political relationship between Australia and these new source countries. Although some civil liberties groups vehemently oppose Australia's migration policies,¹¹⁸ the political pressure that these groups exert is not strong enough to influence policy-makers. This is marked by the bipartisan support for boat migration deterrence and tougher border control during the November 2001 election.¹¹⁹ In the United States, a long history of disparate treatment of Haitians from an anti-communist nation and Cubans from a communist one shows that foreign policy implications often affect domestic immigration policy.¹²⁰ Australia, unlike the United States, has little political interaction with Afghanistan or Iraq; thus, the consequences of refusing refugees are seemingly insignificant.

Meanwhile, the ambiguity of the word "territory" in Articles 31 and 32 of the Refugee Convention enables Australia to diverge in its interpretation and to repel large numbers of boat migrants before they land. The Refugee Convention is criticized by commentators for its ambiguity regarding the rights of asylum seekers who are encountered in extra-territorial waters.¹²¹ While Articles 31 and 32, respectively, prohibit States

¹¹⁴ In fiscal year 2000-01, 54% of boat arrivals were Afghan and 24% were Iraqi. *Background Paper*, *supra* note 108. In fiscal year 1999-2000, 55% of boat arrivals were Iraqi and 30% were Afghan. *Id.* However, in fiscal year 1998-99, only 13% of boat arrivals were Iraqi and 10% were Afghan. *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See John Shaw, *Refugee Issue Clouds Visit by Australian to the U.S.*, N.Y. TIMES, Jan. 27, 2002, LEXIS, News Library.

¹¹⁹ *Id.*

¹²⁰ Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 B.Y.U. L. REV. 1139, 1177 (1993).

¹²¹ Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 232 (1996) [hereinafter *Revitalizing*]. "Such criticism stems from four areas of weakness: (1) the vagueness and manipulability of . . . the refugee definition; (2) the lack of an agreed framework for refugee determination and the risks involved in harmonization efforts . . . ; (3) crucial substantive lacunae or ambiguities, particularly the right to receive asylum, the right of admission, the rights of asylum-seekers interdicted at sea, and the right of temporary refuge for forced migrants who do not qualify as Convention refugees; and (4) key gaps in inter-state obligations, especially burden-sharing through admission or refugees, security issues relating to refugee encampments and dependable financing of refugee prevention and relief strategies." *Id.*

Parties from “expel[ing] a refugee lawfully in their territory”¹²² and from “impos[ing] penalties on account of their illegal entry or presence,”¹²³ the Refugee Convention fails to specifically address the treatment of potential refugees who illegally land in external territories or who are intercepted en route to their destined country of asylum.

Where the Refugee Convention fails to define the term “territory,”¹²⁴ Australia’s Parliament interposed a limited meaning and excised the territorial islands from its migration zone in order to disclaim responsibility for the mass influxes of Afghan and Iraqi asylum seekers who land there.¹²⁵ Australia’s Parliament merely followed in the footsteps of the U.S. Supreme Court, which established that asylum seekers traveling to the United States have no right to asylum processing if intercepted on the high seas.¹²⁶

2. *Blurred Distinction Between the Economic Migrant and the Refugee*

Individual status determination by States Parties is an arduous process because a clear dichotomy between the economic migrant and the refugee is not possible in most cases. While the economic migrant is typically one “drawn” voluntarily to a new life in another country for personal or economic reasons, the refugee is one “driven” to migration by the need to find foreign state protection.¹²⁷ States withhold refugee protection from persons who are merely seeking improved economic conditions because economic migrants are not protected as refugees by the Protocol.¹²⁸ Today’s asylum seekers, however, are both drawn and driven, choosing to migrate in response to a complex mix of political and economic considerations.¹²⁹ Thus, the line distinguishing a refugee from an economic migrant is often blurred.¹³⁰ An asylum seeker’s flight from his or her country of origin, even if triggered by persecution, may also be influenced by other pull factors,¹³¹ such as family networks, language proficiency, religion, educational opportunities, and economic opportunities in the country of asylum.

¹²² Refugee Convention, *supra* note 50, art. 32(1).

¹²³ *Id.* art. 31(1).

¹²⁴ Although the Refugee Convention does not unambiguously define “territory,” the UNHCR has interpreted the plain meaning of “territory” in Article 33 to impose the *nonrefoulement* obligation to “arise wherever a State acts.” See UNHCR Brief, *supra* note 94.

¹²⁵ Migration Amendment (Excision from Migration Zone) Act, 2001 (Austl.).

¹²⁶ See *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993); *supra* Part III.B.2.

¹²⁷ N.L. ZUCKER & N.F. ZUCKER, *THE GUARDED GATE: THE REALITY OF AMERICAN REFUGEE POLICY* 143 (1987), *quoted in* Martin, *supra* note 53, at 1275.

¹²⁸ Protocol, *supra* note 50, art. 1(A)(2).

¹²⁹ See Martin, *supra* note 53, at 1275.

¹³⁰ *Id.*

¹³¹ *Id.* at 1276-77.

Although many of the asylum seekers arriving in Australia may have left conditions of economic hardship, most will still be classified as refugees.¹³² In Iraq, not only is torture of political prisoners common, including beheading and amputation of the tongue,¹³³ but economic sanctions imposed by the United Nations, which were intended to arrest Saddam Hussein's weapons program, have had a devastating impact on the living conditions of common Iraqis.¹³⁴ Moreover, in Afghanistan, the Taliban imposed the strictest form of Islamic punishment in the world; hence, many Afghans were severely punished for expressing unpopular religious beliefs, being of the female gender, or having political affiliation in an opposition group.¹³⁵ Although the conditions in Afghanistan have changed with the fall of the Taliban regime in December 2001,¹³⁶ most Afghans and Iraqis who arrived in Australia prior to that date simply were not economic migrants.

Status determination of asylum seekers is a difficult process for States Parties to the Refugee Convention because Article 1 does not provide "a simple, universal standard for separating the refugee from the economic migrant."¹³⁷ Without a clear definition, States Parties inevitably establish situation-dependent tests for status determination; for example, the U.S. interdiction program only passed twenty-eight out of 25,000 Haitian

¹³² There are about 1100 asylum seekers on Nauru but, other than Ireland, which has agreed to accept fifty, no other resettlement places have been secured. *Next Smuggling Target*, *supra* note 60. All but one asylum seeker out of the 131 processed in New Zealand were granted refugee status and resettlement there. Christopher Niesche, *Afghans Find Hope in NZ*, WEEKEND AUSTRALIAN, Feb. 2, 2002, LEXIS, News Library. New Zealand further agreed to resettle 200 more refugees who were processed by the UNHCR in Indonesia. Tim Dodd, *NZ To Take 200 Refugees*, AUSTRALIAN FINANCIAL REV., Mar. 5, 2002, LEXIS, News Library.

¹³³ Amnesty Int'l, *Amnesty International Report 2001: Middle East and North Africa Regional Update*, <http://web.amnesty.org>.

¹³⁴ Eric Hoskins, *The Humanitarian Impacts of Economic Sanctions and War in Iraq*, in POLITICAL GAIN AND CIVILIAN PAIN 91, 110-29 (Thomas G. Weiss et al. eds., 1997) (noting most Iraqi civilians live in a state of extreme hardship and deprivation: health care, nutrition, education, water, sanitation, and other basic services are at minimum levels); ANTHONY H. CORDESMAN & AHMED S. HASHIM, IRAQ: SANCTIONS AND BEYOND 143 (1997) (noting the United Nations special commission investigating the impact of sanctions on Iraq claimed that four million Iraqis were "at severe nutritional risk"); *see also U.N. Not Celebrating on 10th Anniversary of Iraq Sanctions*, DEUTSCHE PRESS-AGENTUR, Aug. 3, 2000, LEXIS, News Library, World Publications (noting that the United Nations Children's Fund reported a dramatic increase in the mortality rate for Iraqi children under five due to economic sanctions).

¹³⁵ M.J. GOHARI, THE TALIBAN: ASCENT TO POWER 98-110 (2000); Amnesty Int'l, *Amnesty International Report 2001: Asia Regional Update*, <http://web.amnesty.org>; *see also* PETER MARSDEN, THE TALIBAN: WAR, RELIGION AND THE NEW ORDER IN AFGHANISTAN (1998).

¹³⁶ Dexter Filkins, *A Nation Challenged: Rise and Fall; The Legacy of the Taliban is a Sad and Broken Land*, N.Y. TIMES, Dec. 31, 2001, at A1. Australian officials will offer financial incentives to Afghan asylum seekers to return to their homeland. Steve Lewis & Aaron Patrick, *Afghans Offered Cash to Go Home*, AUSTRALIAN FINANCIAL REV., Feb. 1, 2002, LEXIS, News Library. The incentive scheme is expected to mirror the scheme provided for Kosovar refugees, about AUD 4000 per family. *Id.*

¹³⁷ *Sanctuary Under Review*, *supra* note 98, at 253.

migrants intercepted between 1981 and 1991 through preliminary asylum screening.¹³⁸ The rest were classified as economic migrants.¹³⁹ The ambiguity in distinguishing economic migrants from refugees is further complicated when the asylum seekers pass through other safe countries on the way to Australia where they could have sought refuge, such as Indonesia.

3. *Proximity to Developing Countries*

Australian authorities assert that, under the Refugee Convention, asylum seekers should be processed in the first safe country that they enter;¹⁴⁰ however, there are great difficulties with this approach.¹⁴¹ Indonesia, as well as other nations that asylum seekers may pass through before arriving in Australia, may be safe for asylum seekers in that they will not be subjected to persecution there; however, these supposed safe countries may not seem safe from the perspective of the asylum seeker. For example, Indonesia does not provide for the granting of asylum or refugee status in accordance with the Refugee Convention or Protocol.¹⁴² Although the Indonesian government cooperates with the UNHCR to process asylum seekers who arrive there,¹⁴³ the asylum seekers who are found to be valid refugees in Indonesia must wait until a country with a resettlement program, such as Australia or New Zealand, offers a resettlement grant.¹⁴⁴ Many asylum seekers in Indonesia, become frustrated by the resettlement delays

¹³⁸ Mitchell, *supra* note 89, at 73.

¹³⁹ *Id.*

¹⁴⁰ Alison Croweller & Megan Saunders, *Refugees' Plight a 'Lifestyle Choice,'* AUSTRALIAN, Jan. 8, 2002, LEXIS, News Library (reporting that Phillip Ruddock, Immigration Minister, claimed they were "choosing to leave situations of safety and security.")

¹⁴¹ In some cases movement from a country of first asylum can be described as "irregular." *Refugee Protection*, *supra* note 12, at 9. In other instances, the country of first asylum cannot provide adequate protection at basic human rights standards. *Id.* The recommendation of the Global Consultations is that States Parties should undertake responsibility to strengthen the capacity of ill-equipped countries of first arrival to provide adequate protections for asylum seekers. *Id.*

¹⁴² Department of State, 107d Cong., 2d Sess., Country Reports on Human Rights Practices for 2001, at <http://www.state.gov/g/drl/hr/c1470.htm> (last visited Mar. 11, 2002).

¹⁴³ *Id.*

¹⁴⁴ As of December 31, 2001, the UNHCR had registered 2835 refugees and asylum seekers. *Id.* New Zealand has agreed to accept 200 of the refugees in Indonesia who are waiting for resettlement; Australia has only accepted one girl whose family drowned on a refugee boat. Tim Dodd, *NZ To Take 200 Refugees*, AUSTRALIAN FINANCIAL REV., Mar. 5, 2002, LEXIS, News Library. Refugees from the Middle East and Afghanistan, who are temporarily accommodated in Indonesia, have caused consternation among the residents, because the UNHCR living conditions are much better than the living conditions of most of the host country residents. Dewi Anggraeni, *Trickle Won't Swamp Us*, AUSTRALIAN (Feb. 6, 2002), LEXIS, News Library. As some Indonesian nationals told a reporter, "They eat three meals a day, their normal meals include meat and chicken, their living quarters are big and comfortable"

and still attempt the journey to Australia to claim Onshore protection there, as evinced by the tragic deaths of the thirty processed refugees on the overcrowded vessel which capsized in the Sunda Strait.¹⁴⁵ Pakistan and Iran are also questionable safe countries for ethnic minorities because of their harsh treatment of Afghan refugees; asylum seekers in these countries have not escaped all threats to life or freedom.¹⁴⁶

Australia has attempted to develop a cooperation program with Indonesia to manage the flow of illegal migrants passing through Indonesia,¹⁴⁷ but Indonesia has a leaky border and many asylum seekers arrive inconspicuously without being inspected by immigration officers at the ports of entry.¹⁴⁸ These migrants then continue their precarious journey via rickety boats contracted by people smugglers.¹⁴⁹ Furthermore, there is growing concern that the cooperative relationship between Indonesia and Australia is no longer strong;¹⁵⁰ Indonesia's navy chief, Admiral Indroko Sastrowiryo, asserted that asylum seekers should be allowed to continue their journeys to Australia "because it is their basic right."¹⁵¹

4. *People Smuggling Networks*

While Australia has a substantial Offshore Resettlement Program,¹⁵² upon which it has founded an international reputation as a generous

¹⁴⁵ See *supra* text accompanying note 21.

¹⁴⁶ Many Afghan refugees who have entered Pakistan since 1996 do not integrate well with other Afghan refugees or with local Pushtuns. WORLD REFUGEE SURVEY 2001, *supra* note 54, at 162. Some Afghan refugees in Pakistan have been threatened or killed. *Id.* Moreover, most Afghan refugees in Iran are undocumented; they live a marginal existence in constant fear of deportation and without rights to work, to receive medical services, or to send their children to school. *Id.* at 176. See also Mason, *supra* note 3, at 2.

¹⁴⁷ *Trading in Misery*, AUSTRALIAN FINANCIAL REV., Aug. 31, 2001, LEXIS, News Library. The close proximity of Indonesia to Australia's territorial islands makes it an almost inevitable point of transit for asylum seekers from Iraq and Afghanistan. See *supra* notes 3 and 7, referring to the geographical locations of Australian territorial islands.

¹⁴⁸ *Megaphone Drowns Out Reality*, AUSTRALIAN FINANCIAL REV., Sept. 12, 2001, LEXIS, News Library.

¹⁴⁹ *Trading in Misery*, *supra* note 147. Typically, asylum seekers from Afghanistan and Iraq travel by boat or plane to transit countries, such as Malaysia—which is one of a group of countries that offer free visa entry to Muslims—or Indonesia. *Id.* Asylum seekers then board Indonesian fishing boats for passage to Australia. *Id.*

¹⁵⁰ *Boat Heading This Way*, *supra* note 18. Indonesians referred to Australia's treatment during the months of August to October 2001 as "megaphone diplomacy." *Howard Starts to Heal Wounds in Jakarta Visit*, AUSTRALIAN, Feb. 8, 2002, LEXIS, News Library. In an attempt to improve Australia-Indonesia relations Prime Minister Howard offered five police boats in early February 2002 to help Indonesia combat people smuggling. *Id.*

¹⁵¹ *Boat Heading This Way*, *supra* note 18.

¹⁵² *Fact Sheet 60*, *supra* note 101; CROCK, *supra* note 28, at 124.

country,¹⁵³ this system does not cater to the people who are in the greatest need of immediate resettlement.¹⁵⁴ Asylum seekers who turn to people smugglers are conveyed to Australia in a matter of a few days, while the wait in line for an Offshore resettlement grant in Australia is over one year long.¹⁵⁵ Desperate victims cannot afford to wait in the queue for legal refugee status,¹⁵⁶ and thus they attempt sea voyage to Australia to claim Onshore protection. Consequently, the journey to Australia for an illegal migrant is usually facilitated by people smugglers who operate out of Indonesia.¹⁵⁷

People smugglers are not only a problem for Australia, but also constitute an international dilemma,¹⁵⁸ earning nearly USD 20 billion in profits annually.¹⁵⁹ Some *Tampa* asylum seekers disclosed that they had paid USD 16,000 to the people smugglers operating out of Indonesia for passage to Australia.¹⁶⁰ While concerned with people smuggling because it is a dangerous method of travel for asylum seekers to engage in and because it undermines the public faith in the asylum system, the UNHCR refuses to become a crime control body.¹⁶¹ Thus, States Parties are left to devise their own methods for controlling people smuggling networks.¹⁶²

¹⁵³ CROCK, *supra* note 28, at 124.

¹⁵⁴ *Id.* at 125.

¹⁵⁵ See *Sanctuary Under Review*, *supra* note 98, at 252.

¹⁵⁶ The "queue" refers to the wait for a protection visa through the Offshore Resettlement Program. Corlett, *supra* note 104, at 17-18. "This perception is based on the erroneous notion that there is a well-organised international refugee queue." *Id.* at 17. "A more appropriate metaphor to that of a 'refugee queue' might be that of a 'refugee heap' out of which very few are plucked for resettlement in countries such as Australia." *Id.* at 18.

¹⁵⁷ Department of Immigration and Multicultural and Indigenous Affairs, *Australian Immigration Fact Sheet 73: People Smuggling*, at <http://www.immi.gov.au/facts/73smuggling.htm> (last modified Nov. 16, 2001); see also Esmaili & Wells, *supra* note 1, at 224.

¹⁵⁸ See, e.g., Nuala Haughey, *Asylum-Seekers Find First World Hard to Get To*, IRISH TIMES, Dec. 10, 2001, LEXIS, News Library (stating that "an estimated seven million illegal immigrants are brought to Europe every year by smugglers"); *Refugee Protection*, *supra* note 12, at 3 ("It is now commonly agreed among governments and international agencies that a multi-faceted approach is the only response with any hope of success in combating trafficking, i.e., with any prospect of matching the sophistication and multi-nationality of the trafficking networks."); see also GLOBAL HUMAN SMUGGLING: COMPARATIVE PERSPECTIVES (David Kyle & Rey Koslowski eds., 2001).

¹⁵⁹ Glenn Mitchell & Jim Dickins, *Trading in Tragedy*, HERALD SUN, Oct. 27, 2001, LEXIS, News Library, Major World Newspapers.

¹⁶⁰ Christopher Niesche & Megan Saunders, *Safe at Last: First of the Tampa Refugees Find a Home*, AUSTRALIAN, Dec. 13, 2001, LEXIS, News Library.

¹⁶¹ *Refugee Protection*, *supra* note 12, at 7.

¹⁶² But see *Note on International Protection*, U.N. GAOR Exec. Comm. of the High Commissioner's Programme, 52d sess., U.N. Doc. A/AC.96/951 (Sept. 13, 2001), <http://www.unhcr.ch>. Two protocols on smuggling and trafficking to the United Nations Convention against Transnational Organized Crime, opened for signature in December 2000: the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. *Id.* at 4-5. Moreover, thirty-seven nations participated in a people smuggling conference in Bali, hosted by Australia and Indonesia, at the end of February 2002. *Modest Progress on People Smuggling*,

As the influx of asylum seekers from new source countries increases, States Parties feel uncomfortable about where to draw the asylum line. Australia's Immigration Minister has expressed a fear of seeming "soft" and aims to make Australia less attractive for boat migrants by tightening the laws under which illegal migrants are processed.¹⁶³ Although scholars in the field argue that the Refugee Convention regime is "incomplete" and "ill suited" to address modern-day refugee migration patterns,¹⁶⁴ few suggestions have been made on how to reopen the Refugee Convention without ultimately eviscerating the rights that currently exist for refugees.¹⁶⁵

C. *Boat People Deterrence: 2001 Border Control Legislation*

On September 26, 2001, the Australian Parliament passed border control legislation to deter people smugglers and fortify Australia's coastline.¹⁶⁶ The swift passage of this new legislation immediately followed the Federal Full Court decision in *Ruddock v. Vardarlis* that the *Tampa* asylum seekers were not illegally detained on board,¹⁶⁷ and was intended to legislatively justify the Federal Government's detention of asylum seekers on board the *Tampa* if the case went on appeal to the High Court.¹⁶⁸

In *Vardarlis v. Ruddock*,¹⁶⁹ civil liberties lawyers—including the Victorian Council of Civil Liberties and independent solicitor Eric

AUSTRALIAN FINANCIAL REV., Mar. 2, 2002, LEXIS, News Library. Working groups were established at the conference and are expected to report back in one year's time. *Id.*

¹⁶³ Ian Henderson, *Ugly Politics in Tragedy's Wake*, AUSTRALIAN, Oct. 24, 2001, LEXIS, News Library.

¹⁶⁴ See *Revitalizing*, *supra* note 121, at 229-31 (acknowledging that some scholars have this view); *Sanctuary Under Review*, *supra* note 98, at 252 (acknowledging that the Refugee Convention is ill-equipped to deal with the reality of modern refugee flows). See also *No Shame in Putting National Interest First*, *supra* note 6 (quoting the Australia Day message of Harry Gibbs, former Chief Justice of the Australian High Court: "[T]he convention needs to be rewritten or entirely abrogated as being ill suited to the conditions of today.").

¹⁶⁵ See *Revitalizing*, *supra* note 121, at 235 ("[W]hatever its inadequacies, the Refugee Convention should not be abandoned until the international community is prepared, as it was in 1951 and 1967, to assume new binding legal commitments to protect forced migrants.").

¹⁶⁶ Border Protection (Validation and Enforcement Powers) Act, 2001 (Austl.); Migration Amendment (Excision from Migration Zone) Act, 2001 (Austl.); Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act, 2001 (Austl.); Migration Legislation Amendment Act, No. 1, 2001 (Austl.); Migration Legislation Amendment Act, No. 5, 2001 (Austl.); Migration Legislation Amendment Act, No. 6, 2001 (Austl.); and, Migration Legislation Amendment (Judicial Review) Act, 2001 (Austl.).

¹⁶⁷ *Ruddock v. Vardarlis*, 183 A.L.R. 1 (Sept. 18, 2001).

¹⁶⁸ The Australian Constitution provides that the judicial power of the Commonwealth of Australia is vested in a Federal Supreme Court, called the High Court of Australia. Commonwealth of Australia Constitution Act, § 71 (Austl.), <http://scaleplus.law.gov.au> (last visited Mar. 5, 2002).

¹⁶⁹ *Vardarlis v. Ruddock*, 64 A.L.D. 67 (Sept. 11, 2001), *overruled by* *Ruddock v. Vardarlis*, 183 A.L.R. 1 (Sept. 18, 2001).

Vardarlis—filed an action in Australian Federal Court on behalf of the *Tampa* asylum seekers, arguing that the Federal Government had acted unconstitutionally by detaining the asylum seekers on board.¹⁷⁰ Vardarlis first prevailed in Federal Court, but later lost on the Federal Government's appeal to the Full Court, where the majority held that the asylum seekers were not detained and that the Federal Government had acted within its constitutionally-granted executive power by taking steps to prevent the landing of the migrants.¹⁷¹

The Australian Government feared the High Court would reverse if the Full Court decision was considered on appeal. Thus, in an attempt to bolster its case, the Liberal Party pushed retroactive legislation through Parliament one week later to, among other provisions, formally excise the external territories from Australia's migration zones¹⁷² and demanded attorney and court fees from the defeated Civil Liberties lawyers.¹⁷³ A summary of important provisions of the acts passed on September 26, 2001 follows:¹⁷⁴

- (1) Ashmore, Cartier, Christmas, and Cocos Islands were removed from Australia's migration zone, effectively excising these territories from Australia for migration purposes; thus, those who illegally arrive at these islands may be taken to a declared country and can no longer apply for a visa to Australia, unless the Minister determines otherwise for the benefit of the public interest.¹⁷⁵
- (2) A new visa system was established where the type of visa granted depends upon whether the asylum seeker landed at an excised territory and whether the asylum seeker traveled through one or more safe countries where she could have stayed without fear of persecution:

¹⁷⁰ *Id.*

¹⁷¹ Ruddock v. Vardarlis, 183 A.L.R. 1 (Sept. 18, 2001).

¹⁷² Border Protection (Validation and Enforcement Powers) Act, 2001 (Austl.); Migration Amendment (Excision from Migration Zone) Act, 2001 (Austl.); Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act, 2001 (Austl.); Migration Legislation Amendment Act, No. 1, 2001 (Austl.); Migration Legislation Amendment Act, No. 5, 2001 (Austl.); Migration Legislation Amendment Act, No. 6, 2001 (Austl.); and, Migration Legislation Amendment (Judicial Review) Act, 2001 (Austl.).

¹⁷³ Ruddock v. Vardarlis, 2001 F.C.A. 1865, 2001 AUST FEDCT LEXIS 2122 (Dec. 21, 2001). Eric Vardarlis, attorney for the *Tampa* asylum seekers, claimed a victory after a court ruled that the Government would bear its own costs of AUD 200,000 in attorney and court fees. *Id.*; *Navy turns boat back to Indonesia*, *supra* note 22.

¹⁷⁴ Phillip Ruddock, *Information on New Border Control Legislation*, at http://minister.immi.gov.au/media01/r01177_inform.htm (last visited Oct. 22, 2001).

¹⁷⁵ Migration Amendment (Excision from Migration Zone) Act 2001.

- (a) an asylum seeker who arrives at an excised territorial islands will only qualify to apply for a three-year temporary Secondary Movement Offshore Entry visa; and
 - (b) an asylum seeker who spends more than seven days in another safe country en route to Australia, but who is not an Offshore Entry person, may apply for a five year temporary Secondary Movement Relocation visa. The Secondary Movement Relocation visa-holder may apply for a permanent visa after four and a half years, and his family can only join him after he successfully obtains a permanent visa.¹⁷⁶
- (3) People smugglers will now be sentenced to a minimum of five and a maximum of twenty years in prison for a first conviction and a minimum of eight and a maximum of twenty years for a second conviction. The new laws further enhance Australian authorities' existing powers to board boats carrying illegal travelers, search the boat, detain the passengers, and remove them from the boat. Court challenges to these actions are not allowed.¹⁷⁷
 - (4) Media attention solicited by the asylum seeker which effectively put him or her at risk in the country of origin will be disregarded in the determination of refugee status.¹⁷⁸
 - (5) Adverse inferences will be drawn if people refuse to provide documents to prove their nationality and do not have an acceptable explanation for the missing documents or if the person refuses to provide information on oath or affirmation.¹⁷⁹
 - (6) Australian courts will be required to adhere to and not expand beyond the definition of a refugee as stated in the Refugee Convention and Protocol.¹⁸⁰
 - (7) Illegal migrants may not challenge a visa rejection, except on very limited grounds, and no class action law suits are allowed.¹⁸¹

¹⁷⁶ Migration Amendment (Excision from Migration Zone) (Consequential Provisions), 2001.

¹⁷⁷ Border Protection (Validation and Enforcement Powers) Act, 2001.

¹⁷⁸ Migration Legislation Amendment Act, No. 6, 2001.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Migration Legislation Amendment Act, No. 1, 2001; Migration Legislation Amendment (Judicial Review) Act, 2001.

V. THE CHALLENGE: TO RECONCILE THE 1951 IDEALS WITH CURRENT REFUGEE ISSUES

A. *Australia's New Border Control Amendments Contravene International Law*

After the 2001 amendments, Australia fails to comply with important obligations of the Refugee Convention. While the United States failed to meet Article 33 obligations when Haitian asylum seekers were returned without asylum screening, Australia most notably fails to meet Article 31 obligations by penalizing asylum seekers who arrive illegally by boat.¹⁸² The Australian system had already been criticized for its two-tiered visa protection plan, which prefers those who apply for refugee determination from overseas over unauthorized arrivals, who are portrayed as illegal refugees, abusers of the generous refugee system, threats to the Australian community, and "queue jumpers."¹⁸³ In light of the 2001 Border Control Amendments, Australia not only continues to discriminate between legal and illegal refugees, but automatically penalizes and repels all asylum seekers who arrive by boat.

Australia may also contravene Article 32 of the Refugee Convention by eliminating due process for asylum seekers who arrive at territorial islands. Even though the asylum seekers were processed for refugee determination by UNHCR at Nauru and other locations, they were expelled from Australian territory without due process of law as required by Article 32. Australia's new interpretation of the word "territory" excises territorial islands from migration territory, while the UNHCR asserts that international obligations apply "whenever a state acts," regardless of whether in territorial or extraterritorial waters.¹⁸⁴ If a boat migrant transported to Nauru proves not to be a refugee, then there is no breach of the Refugee Convention. However, with this new legislation, Australia erroneously assumes that all boat people will prove not to be refugees.

¹⁸² Ironically, the applicability of the Refugee Convention's Article 31 was not considered by the Australian Federal Court in *Ruddock v. Vardalis*. 183 A.L.R. 1 (Sept. 18, 2001). GOODWIN-GILL, *supra* note 40, at 24. Furthermore, temporary protection schemes, such as Australia's TPV, seem to contravene the Refugee Convention's Article 33 obligation of *nonrefoulement*, because refugees, though not immediately returned, are eventually returned to their country of origin. Esmaeili & Wells, *supra* note 1, at 238-240; for a discussion of the Refugee Convention's Article 33, see *supra* note 60 and accompanying text. The TPV scheme not only fails to correspond with the three solutions advocated by the UNHCR, but keeps the refugees in limbo with the possibility of return to the country of origin after the visa expires and thus unable to rebuild a normal, permanent life.

¹⁸³ Corlett, *supra* note 104, at 13-14.

¹⁸⁴ UNHCR Brief, *supra* note 94.

Most boat people who arrive on Australian soil are refugees; statistics show that at least two-thirds of the Afghan and Iraqi boat migrants processed in Australia in 1999 were granted refugee status as valid asylum seekers fleeing war or persecution.¹⁸⁵ Since the *Tampa* incident, 130 out of 131 asylum seekers sent to New Zealand were granted refugee status and resettlement there.¹⁸⁶ Other refugees at Nauru, Papua New Guinea, and Indonesia must also be resettled unless they choose voluntary repatriation based on the changed circumstances in Afghanistan.¹⁸⁷

B. Australia's Response to Boat People is Not Sustainable Legal Policy

Not only illegal in light of international obligations, Australia's disproportionately harsh migration laws pertaining to boat people are both unsustainable and economically infeasible. Australia's new policy relies on the cooperation of third-party developing nations that have little to no infrastructure to accommodate refugees.¹⁸⁸ The Pacific Solution,¹⁸⁹ which enables Australia to send unauthorized arrivals who are intercepted at an excised territorial island or at sea to be taken to a "declared country," such as Nauru, Papua New Guinea, and other island states of the Pacific, is unsustainable because developing nations will soon grow weary of the asylum processing camp role.¹⁹⁰ In some cases, island states such as New Zealand might take asylum seekers merely for philanthropic reasons.¹⁹¹ However, most nations rarely find third countries willing to take refugees off their hands. For example, Australia had to bribe Nauru and Papua New Guinea into taking asylum seekers,¹⁹² and Fiji refused to accept 1000 asylum seekers that Australia asked them to house for processing in return for money.¹⁹³

¹⁸⁵ *Many Iraqis, Afghans Win Sanctuary*, AGE, Jan. 17, 2000, LEXIS, News Library, Major World Newspapers; see also Corlett, *supra* note 104, at 17.

¹⁸⁶ See *Afghans Find Hope in NZ*, *supra* note 132.

¹⁸⁷ Although the Taliban no longer governs Afghanistan, the U.N. warned that the humanitarian crisis was worsening as refugees returning home from Pakistan placed further strains on food and other aid. Crossweller & Saunders, *supra* note 140.

¹⁸⁸ Nauru and Papua New Guinea were not prepared to accommodate asylum seekers, but accepted Australia-bound asylum seekers in return for money and infrastructure aid. See sources cited *supra* note 6.

¹⁸⁹ Garran & Saunders, *supra* note 6.

¹⁹⁰ Lindsay Murdoch, *Nauru Says Canberra Must Stick to the Deal*, SYDNEY MORNING HERALD, Mar. 1, 2002, LEXIS, News Library (noting that Nauru officials are concerned that Australia might renege on its promise to resettle refugees who are housed at Nauru by the end of May).

¹⁹¹ See *Ring of Misery Around Region*, *supra* note 6.

¹⁹² See sources cited *supra* note 6.

¹⁹³ Mary Louise O'Callaghan & Megan Saunders, *Fiji Refusal Casts Cloud Over Pacific Solution*, AUSTRALIAN, Nov. 23, 2001, LEXIS, News Library.

Moreover, the interception program is not an economically feasible long-term solution for Australia. The Pacific Solution to date has been estimated to cost the Australian Government AUD 482 million for the 2001-02 fiscal year,¹⁹⁴ while the Government originally allocated only AUD 250 million to process unauthorized arrival for the 2001-02 year.¹⁹⁵ Thus far, the distant asylum processing system has been an expensive solution for Australia—and since the so-called “declared countries” have little to no infrastructure to support sustainable refugee processing camps, there is no end in sight.

VI. CONCLUSION

Australia was asked to absorb large numbers of asylum seekers who arrived unexpectedly and without valid travel documentation from new source countries, Iraq and Afghanistan. Australia responded to this great influx of boat migrants by excising its territorial islands from its migration zone, thereby categorically penalizing all asylum seekers who arrive in mass flux situations by turning away boats. This solution not only defies Australia’s international obligations to refugees, but it is an unsustainable and economically infeasible legal policy as well. If tolerated, it will fuel the deterrence machine that already grinds away at the spirit of the international refugee protection regime, eventually obliterating all refugee rights. In order to salvage an international system for refugee protection, contemporary policy-makers at the national level must reconcile the obligations and ideals of the 1951 Refugee Convention with today’s migration issues.

¹⁹⁴ *Costello Forced to Find \$400M as Refugee Costs Spiral*, *supra* note 16. The 2001-02 Australian Federal Government Budget originally allocated AUD 250 million for processing unauthorized boat arrivals. *Id.* This was boosted by a further AUD 147 million in the mid-year review in December and an additional AUD 85 million in February. *Id.*

¹⁹⁵ *Id.*